Supreme Court, U.S.
FILED

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No. 10-

IN THE
# Supreme Court of the United States

JUDY KNIGHT

Petitioner,

V.

MOORING CAPITAL FUND, LLC; and
MOORING FINANCIAL CORPORATION

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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encourage ineffective reviews? What recourse is available when they are improperly applied? Does deferential review permit, or even encourage, lower court "anything goes" to clear the docket? Why is review of law non-deferential, when justices are presumed to know the law? And deferential review is applied to fact issues that are more prone to errors in interpretation? In other words, are they applied exactly opposite of what would produce more equitable decisions?

Petitioner seeks a writ of certiorari so that the Court can determine the proper application of the standards of review, and resolve the conflict of this decision with its own and other United States courts regarding the admissibility of evidence, of witness testimony, inclusion of complaints under the simple pleading code and the ambiguity of the trial court's conclusions between Petitioner and co-claimant.

The Tenth Circuit Court, without reservation, affirmed in all respects the rulings of the district court. Although Petitioner's Appeal attempted to present certain issues under the clear error doctrine and de novo standard, the Tenth Circuit purportedly affirmed those findings under the deferential abuse of discretion very narrowly applied. In addition the Appeals court ignored several issues, either intentionally or unintentionally. In so doing, the Tenth circuit also ignored rules of the civil court, contravened and departed from decisions of possibly every court in this great land

*Bose Corp. v. Consumers Union of United States,*

*Inc.*, 466 U.S. 485, at 501, 104 S.Ct. 1949, at 1959, 80 L.Ed.2d 502 (1984). When *de novo* review is compelled, no form of appellate deference is acceptable.

The legal maneuvering of the respondents and wholesale adoption by the lower courts of their conclusory statements, while expedient to clear the docket, has obscured the facts of the case requiring detailed re-iteration to disclose the errors in rulings.

That is the rabbit hole that officers of the court like so many Alices plunged through directly into wonderland. Behold the queen of hearts, Respondents, that has spewed its rhetoric into the system Petitioner puts the courts' deference on trial, welcome to the madhatters tea party.

BACKGROUND

These cases are about money, the need for it, the lack of it and

Respondents acts and omissions that denied Petitioner's right of access to it and the consequences that followed

Truly a case of the time-tested proverb "For want of a nail the ...kingdom was lost," illustrating how one seemingly simple event can lead to catastrophic consequences:

Respondents (collectively 'Mooring') are: Mooring Capital Fund, LLC, ('Capital') an unregulated company engaged in purchasing loans/mortgage backed securities, primarily sub-prime, which it packages into portfolios for sale to the public Mooring

Financial Corp. ('Financial'), also unregulated, is the managing/servicing agent for Capital and numerous other corporations formed by the same founder to purchase tax liens across the United States Financial employs about 40 people including accountants, CPAs and attorneys who perform all functions of the other companies

The causes of action in this case stem from Respondents' acts and omissions with regard to their attempts to collect amounts ranging from127%[4]-171%[5] of the amount legally owed on a Note and Mortgage holding a shopping center as collateral. (collectively "the Note") The Note originated in 1992 with an Oklahoma based national bank, and was executed by Petitioner and co-claimant, Petitioner's wholly owned corporation, Phoenix Central, Inc. ("Phoenix"). Bank One purchased the local bank becoming a holder in due course. Capital became a holder by purchasing the note in July 2002. Respondents' bad acts and omissions[6] caused the separate damages claimed by each Appellant and are as relevant to one's claims as they are to the others.

The order of this petition was dictated by Petitioner's belief this Court must first develop a

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[4] See p.10

[5] Demand at 4/8/05 was $363,592.28. versus a post-discovery calculation of $212,906.60.

[6] Refusing to investigate or correct the balance or provide information for 3-5 years.

clear understanding of the damage claims before turning to the facts and issues of law presented here. This is because the lower courts' faulty interpretations improper re-characterization, or misunderstanding of the damages formed the core of the denial of petitioner's entire case.

Petitioner applied for refinancing from other lenders and was approved several times in 2003 and 2004, conditioned on a first mortgage on the shopping center.

Due to Respondents' overstated demands, Petitioner was unable to obtain those funds necessary to reach certain objectives including:

Payoff of higher interest loans and reduction of monthly payments,

Completion of "fixing up" repairs to several vacant former family residences to prepare for sale,

Development of owned 40 acre tract and sale of resultant one-acre residential lots, and

Infusion of capital into going businesses.

Achievement of those objectives would have eliminated ongoing costs associated with property ownership, reduced other expenses and produced revenues from sale proceeds and established business[7]-all of which would have increased the cash

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[7] Projected losses from this business were not included in damages.

available to her.

So I ask, does that plan make sense to you? The Tenth circuit said it does not.

Method of computing damage schedules and summary:

Simply put, Petitioner's damages presented were limited to the

A. Re-investment earnings - Earnings rate times cash generated from:

1. The cash that would have been available (computed by adding):

a. Cash that would have been received from the sale of certain property at certain times, net of "fixing up" costs not paid out of new financing to

b. Costs that would not have occurred but for Respondents' torts. (See B below).

PLUS

B. Re-imbursement of costs that would not have occurred "Excess Expenses" (computed by adding):

1. Actual out of pocket costs paid that would have disappeared with the sales of the property, e.g. taxes, insurance, etc.

2. Actual Interest costs paid and accrued in excess of amounts that would have occurred with new re-financing due to variance in rates and timing of payoff.

3. Attorney fees required to achieve desired results (in mitigation forcing correct calculation or wasted due to vexatious litigation.)

Does that make sense? Is that straight forward? Appellate says it is not.

*"And her plans and projections went beyond straightforward common-sense calculations."* *Apx22a*

## COURT PROCEEDINGS

The Phoenix case was ongoing for nearly 3 years before Petitioner was allowed to join. It's necessary to include certain data re Phoenix' case here as many of the arguments are the same only the damages differ.This should not be construed as arguing Phoenix' case, as the other courts deemed, but merely providing relevant history. The inclusion of this information should become apparent as the story unfolds.

It is also apparent some of the rulings and pre-conceived notions made in the Phoenix case poured over to Knight in error.

*"After Phoenix and Ms. Knight stopped making payments on the Note in February 2005, Capital initiated a state-court action against Phoenix [seeking $363,592 as of April 8] to recover on the Note and to foreclose on the Shopping Center. Citing diversity jurisdiction, Phoenix removed the action to federal court. Phoenix also brought several counterclaims seeking damages for not being able to accomplish the*

*refinancing and therefore not being able to [complete the stated objectives In it's third amended answer and counterclaim Phoenix alleged that Capital breached [the Contract and] the Note's implied covenant of good faith and fair dealing and was liable for negligence, tortious interference with prospective business relations, and tortious breach of contract." (Apx3a)*

Phoenix also requested a declaratory judgment to determine the true note balance.

Attempting to arrive at an accurate balance, counsels for Phoenix and Capital exchanged loan histories in January, 2006, but did not reach agreement Notably, Respondents' schedules did not agree with any previous balances demanded or include balance on date purchased.

[After being denied the right to intervene as being too close to trial date,] *"Ms. Knight and another of her companies, Mini Malls of America, filed a separate state-court action against Capital and Financial"* [in May, 2007, served in November.].Apx4a

[On Aug 7, 2007, in the Phoenix case]," *The district court granted partial summary judgment in favor of Capital with respect to liability (but not damages) on its claims."* Apx3a

The court rejected Ms. Knight's "course of dealing" method of applying payments shown on the

exchanged loan schedule, accepted Moorings[8]' post-litigation calculation with one exception, but made no mention of this ruling as a declaratory judgment.

"*[] It also granted Capital summary judgment on all of Phoenix's counterclaims, except the counterclaim for breach of the implied covenant of good faith and fair dealing"* [deeming Capital's actions as a mere "mistake"]. Apx3a

Aug 17th, 4 days before trial date, Capital finally produced requested but previously concealed information from Bank One. Those documents invalidated Capital's previous arguments. That submission proved Mooring knew the note balance when they purchased it was $316,040.12 instead of the $401,001.08 they booked, hardly explainable as a typo or transposition. This most material admission caused a cancellation of Phoenix' trial. In March 2008 the court vacated its 2007 orders, stating:

> "On the eve of trial, Mooring apparently located and turned over additional discovery which, viewed in the light most favorable to Phoenix, suggests Mooring knew or should have known of the actual loan payoff and interest rate at the various times it was quoting or seeking a different payoff from Phoenix" Aplt's Apx 435 or Aplt's Sup 236.

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[8] In November, 2006, Respondents accepted Petitioner's balance calculation as of February 28, 2001 as reasonably correct and used it to recalculate balances provided in August, 2007 and October, 2008.

> "By contrast, the additional documents produced by Mooring and now relied on by [P]hoenix as to what Mooring knew or should have known as to the proper amount due, the applicable interest rates and the like are sufficient, viewing them in the light most favorable to Phoenix, to create a justicable issue as to whether Mooring's conduct was knowingly, intentionally or recklessly wrongful so as to afford a potential basis for recovery on some or all of Phoenix's counterclaims. As a result, the court concludes its summary judgment order should be vacated as to Phoenix's counterclaims" Apx116-117a.

Mooring removed Petitioner's action to federal court, and the cases were consolidated in 2008.

Laboring under a misconception that Petitioner was not a maker on the Note, "*the district court dismissed the state-complaint claims because Ms. Knight and Mini Malls had not "state[d] a basis for recovery separate and apart from whatever harm Phoenix may have suffered," but allowed them leave to amend".* Apx4a

Petitioner's counsel interpreted that order as meaning the causes could not be identical to Phoenix'. Therefore the amended complaint alleged negligent omission and misrepresentation and emotional distress.

[Now acknowledging Petitioner as a party to the Note] "*the court held that Mini Malls had shown only*

*an attenuated relationship with Capital that was insufficient to create any legal duty owed by Capital. The court also held that Ms Knight,... may have claims against Capital that paralleled Phoenix's counterclaims, but the allegations did not adequately plead tort liability under applicable Oklahoma law The court allowed Ms. Knight leave to amend...to set forth claims paralleling Phoenix's claims".*

*[In July, 2008] "Ms Knight's second amended complaint set forth [the original complaint's] claims of breach of the implied covenant of good faith and fair dealing, negligence, tortious breach of contract, and tortious interference with present and prospective business relations. The court allowed these claims to proceed." Apx4a*

This statement ignores included alternate claims under tort breach. See pp. 65

[Upon receiving a requested pay-off amount], *"In November 2008 Phoenix and Ms. Knight satisfied the Note so the foreclosure action was dismissed".* Apx4a

It is notable that pay-off amount was $284,008.67 Remarkable actually, because it included accrued interest since April 8, 2005, during which time no payments were made, and the complaint had demanded $ 363,592.

Given these facts, it is indisputable that Capital breached the contract to both parties.

Before trial, the district court:

*...limited the testimony of Phoenix's expert economist, Dr. James Horrell, citing Daubert v.*

*Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)), and Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, 147-49 (1999)*

And at pretrial conference on March 6th, 2009, without benefit of voir dire

*...barred Ms. Knight from testifying about 'lost profits' (sic) from the failure to develop the 40-Acre Parcel and the rental (sic) houses.*

*...indicated that it would be inclined to prohibit lay witnesses from giving opinion testimony about "expert" matters such as projecting development costs or the process of platting a subdivision, although they could testify to historical facts concerning the 40-Acre Parcel.*

*...excluded a 2004 appraisal of the Shopping Center prepared for another lender.*

*...prohibited introduction of any evidence of damages to Mini Malls.*

*...held that Phoenix and Ms. Knight could not claim as damages the bulk of attorney fees they had incurred during the dispute." Apx5a*

And, refused to consider any issues or instructions included in the pre-trial report. See pp. 70.

Thereby, the Court suppressed the presumption that the Petitioner's evidence and testimony would support her position. This is the fulcrum of the court's analysis

On the way to a characterization the court failed to adequately review the competing arguments and

avoid material errors of logic. The court's disposition of this case is troubling because of unwarranted and arbitrary assumptions including:

Selling price was based on something other than comparable sales determined as of the time (in the past) Petitioner expected to sell the properties,

That such comparables could not be determined until anticipated repairs were completed,

That Petitioner was barred from making such determinations

That Petitioner was claiming lost profits from sales of property rather than loss of use of excess funds from net proceeds as in *Maiz v. Virani,* 253 F.3d 641(11th Cir. 2001)

That the sale of owned and vacant former family residences, not previously rented, is a "business".

And most amazingly, that actual expenses caused by the delay were not capable of reasonable calculation and

That neither Petitioner or expert economist were capable of adding up these amounts.

[March 12th] *"At the jury-instruction conference, Ms. Knight's counsel stated that in light of the district court's evidentiary rulings concerning the 40-Acre Parcel and the rental houses, Ms. Knight had to concede that she would not be able to establish her own individual damages, as distinguished from Phoenix's corporate damages."* Apx5a

This concession by counsel was without

Petitioner's knowledge.

*"Accordingly, the district court granted judgment as a matter of law to Capital and Financial on her claims, leaving only Phoenix's counterclaims for the jury." Apx5a*

Appellate Court Rulings

Petitioner adopted Phoenix's arguments by reference in accordance with Fed.R.App.P. Rule 28. (c) therefore an analysis of relevant rulings is appropriate here.

It also appears that the court has mixed the rulings between the two Parties.

**1. Opinions re Phoenix Arguments (Apx6a-16a)**

Exclusion of Evidence - 40-Acre Parcel

*"The court provided two reasons for excluding evidence of damages from failure to develop the 40-Acre Parcel and the rental houses...., It said*

*(a) that such damages could not be recovered under the contract claim because there was no evidence that such damages were within the contemplation of the parties at the time the Note was made and*

*(b) that such damages could not be recovered under the tort claims because there was no evidence that they were foreseeable at the time of the alleged torts.*

*Second, it said that there was no admissible*

*evidence of any lost profits from the parcel and the rental houses because*

*(1) the parties could not call lay witnesses to testify about expert topics such as the platting process and development costs, and*

*(2) Ms. Knight had not been named as an expert witness and she did not have the business experience to testify about the development process.".*

*Phoenix disputes the court's evaluation of Ms. Knight's qualifications to testify about the 40-Acre Parcel. Its "opening brief, however, fails to address the court's other reason for excluding her damages testimony-that the damages ... were not within the parties' contemplation at the time of contracting or foreseeable at the time of the alleged torts. Phoenix .then has waived any challenge to the court's first rationale for barring Ms. Knight's testimony about the 40-Acre Parcel. For the same reason, we will not reverse the district court's decision to bar other testimony (by Dr. Horrell and the lay witnesses) concerning the 40-Acre Parcel and the rental [sic] houses."* *Apx7-8a*

**2. Opinions re Petitioner's Arguments (Apx 17a-23a)**

Petitioner did argue contemplation and foreseeability (Apx 142-153A). The Appellant neither took issue or mentioned those arguments. Therefore, Petitioner must assume that was not an issue and need not be addressed here. The Appellate analysis limited Petitioner's exclusion due to lack of

"business" experience and further concluded that "profits were not capable of reasonably accurate measurement or estimate." (Item c. at Apx 20-22a). There would be no need for that discussion if this assumption is incorrect.

However, Petitioner states she also argued that Respondents' had actual notice, during litigation, both of the specific damages and their continuing nature. (Apx146a-153a)Therefore, even if it were sustainable that Mooring could not conceive of any damages arising from their bad acts before the lawsuit (which it is not), they cannot maintain ignorance after that. Under this concept, the damage calculation would merely move to the date of actual notice furnished by the lawsuit itself. Respondents persisted in their bad acts, coupled with vexatious litigation and unsupported allegations and testimony throughout the entire proceedings which delayed resolution and exascerbated the damages further.

Both parties continuously argued that it was within contemplation and foreseeable that Knight might want to refinance/payoff the Amended Note at any time, at the least, to receive a lower interest rate and/or a longer maturity, or a variety of other reasons. It was equally foreseeable that injury would be likely, if not definite, to occur if Mooring were to deny or delay Knight's right to pay the outstanding balance in full.

Both courts erroneously ignored those arguments.

## REASONS FOR GRANTING THE

PETITION

This Court needs to resolve confusion over the standards of review, their effectiveness, the applicability and adherence to them by the courts. The question is whether the deference embodied in those standards has permitted, or even encouraged, lower court lack of diligence in the interest of judicial time-saving, both in the appellate courts and below. What appeal is there if the appealing court defers to the lower court?

Exclusion of damage evidence denied Petitioner's right to be heard and affected her "substantial rights" within the meaning of Fed.R.Evid. 103(a).

> *See United States v.Johnson,* 594 F.2d 1253 (9th Cir.1979)), cert. denied, 444 U.S. 964, 100 S.Ct. 451, 62 L.Ed.2d 376 (1979).

*"The evidence excluded was lay-witness opinion testimony regarding such matters as the platting and subdivision process for the 40-Acre development and Ms. Knight's own opinion testimony about damages suffered from the delay in the development caused by Capital and Financial. As with expert testimony, the exclusion of lay-witness testimony is reviewed for abuse of discretion. See Zokari v. Gates, 561 F.3d*

*1076, 1088 (10th Cir. 2009).*" Apx21a.

Both courts are wrong. They are wrong on several levels.

Neither the Respondents nor the courts maintained that Petitioner did not suffer damages due to Respondents' torts, but the court arbitrarily denied testimony as to those damages.

The arguments here show that the courts improperly excluded both Ms. Knight's and the expert testimony. First because they either ignored or misinterpreted the evidence presented resulting in improper application of the rules statutes and precedents, next the district court heard no testimony upon which to make those judgments, and third, because that goes to weight not to admissibility and is for the jury to decide. The decisions were clearly erroneous, arbitrary, an abuse of discretion and not in accordance with law or the interest of justice.

Petitioner had a right to testify as to value of property either under Rule 701 or 702. See pp. 35. Further, even if Petitioner could be barred from testifying about the selling price, that had no bearing on testimony about continuing "extra expenses". See pp. 28. And the expert had a right to rely on her data. See pp.45

The courts decision was not harmless.

*"Because of the exclusion of this evidence, the district court properly dismissed Ms. Knight's claims. One necessary element of each claim was lost profits."* Apx22a

But for the court's restrictive evidentiary rulings, the judgment would have been that Capital, at least, breached the contract. This exclusion not only eliminated any recovery of justifiable damages, but also profoundly affected the fees award. See pp.77

Due process requires notice and opportunity to be heard. The corner stone of due process of law is fundamental fairness, which includes amongst other things, both "notice" and "a meaningful opportunity to be heard".

> The right of a defendant to call witnesses is crucial for testing the prosecution's case and defeating the charges against him. Indeed, the "right to present a defense is a fundamental element of due process of law." *Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).* Even if the exclusion does not rise to the level of a constitutional violation, the burden is on the government to prove that the error did not have "a 'substantial influence' on the outcome." *United States v. Rivera,* 900 F.2d 1462, 1469 (10th Cir.1990) (en banc) (quoting *Kotteakos ( v. United States,* 328 U.S. 750, 765, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)).

*"Knight appealed to the United States Court of Appeals for the Tenth Circuit, challenging the District Court's order granting Respondents' 50(a) request for summary judgment on all her complaints." Apx*

In her appeal, Petitioner argued that the Tenth

Circuit should review the District Court's finding due to inconsistencies. She questioned how Mooring could breach the Contract only as to one party to the contract, i.e. Phoenix, without also breaching it to Petitioner.

Moreover, the evidence showed that most of the overstated demands were addressed to Petitioner. Additionally, Petitioner argued that the court should have used its discretion and ruled as a matter of law that Mooring indeed breached the contract by claiming amounts that were not legally owed. This fact was eventually admitted by Mooring and was plainly obvious by the evidence. No other conclusion was possible.

The appellate's only apparent response missed the point entirely. (Apx28a) The court's answer was essentially after the ruling the conclusions were different. Note 3 also demonstrates appellate's confusion as Petitioner made no reference to vacated rulings in Phoenix' separate case. (Apx11a)

## The courts failed to follow the well founded precept to accept as true all disputed facts and inferences therefrom in favor of non-movant, Petitioner, and instead accepted Respondents unsupported allegations.

Every single issue in this case was disputed. Petitioner can recall only one issue that eventually was undisputed when Respondent, after months of denying responsibility, admitted they, in fact, should

have and did not furnish a correct balance. Their unsupported disputes were prolific, relentless and, although distorted or just plain inaccurate, obviously effective in influencing the court to overlook Petitioner's facts and evidence.

> A demurrer to the plaintiff's evidence should be sustained only when there is an entire absence of proof to show any right of recovery. *Boyles v. Oklahoma Natural Gas Co.* 619 P.2d. 613, 616 (Okla. 1980) see note 15. *See*, M*artin v. Stratton*, 515 P.2d 1366, 1368 (Okla. 1973); Tidewater Associated OilCo v.. Slusser, 307 P.2d 827, 828 (1957) .. *Hampton v.Hammons* 743 P.2d 1053 (Okla. 1987) "Following these precepts, we find that the trial court's ruling sustaining the appellee's demurrer to the evidence on the issue of negligence *per se* was error."

There was no absence of proof until after the court denied the admission of it.

> **Petitioner had sufficient evidence to overcome Respondents motion for summary judgment. The district court arbitrarily re-characterized her facts and deferred entirely to Respondents conclusory statements.**

> "We review the grant of summary judgment de novo applying the same standard as the district court embodied in.." "summary judgment is proper if "there is no genuine issue as to any material fact and . . . the

moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). "In applying this standard, we view the factual record and draw all reasonable inferences therefrom most favorably to the nonmovant." Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir.1998).

In ruling upon a defendant's demurrer to the plaintiff's evidence, both the trial court and the reviewing tribunal consider every fact favorable to the party against whom the demurrer is directed along with any reasonable inferences which may be drawn therefrom. All conflicting evidence favorable to the defendant is disregarded. *Thompson v. Presbyterian Hosp., Inc.*, see note 17, supra at 262-63; *Boyles* , , supra at 616 . *See also* Hood v Hagler, 606 P.2d 548, (Okla. 1986) held the conflicting evidence sufficient to create a jury question on provocation.

Because every fact favorable to the party against whom the demurrer is directed, together with all reasonable inferences which may be drawn therefrom, is admitted as true by a demurrer to the evidence, and all conflicting evidence is disregarded; Thompson v. Presbyterian Hosp. Inc., id at 262, *see* Neese v. Shawnee Medical Center Hospital, 626 P.2d 1327, 1331 (Okla. 1981); Jordan v. General Motors Corp., 590 P.2d 193, 196 (Okla. 1979); Martin v. Stratton, , 515 P.2d 1366, 1368 (Okla. 1973)supra at 1368.

It is not our function to comment upon the weight of appellant's evidence, nor are we in a position to say how we would decide the case were we the jurors. It is for the jury, once competent evidence has been introduced from which the necessary facts can be found, "to weigh conflicting evidence and inferences, and determine the credibility of witnesses." Boeing Co. v. Shipman, 411 F.2d at 375, (5th, 1969)(en banc).

The Boeing case was meant to end the controversy regarding when the jury may be evicted from a case, but once again we have before us a case of unwarranted jury displacement. Although we are without the use of a computer to afford us a complete statistical survey, we nevertheless suspect that such cases are legion and that their ranks are increasing. See, e. g., Trawick v. Manhattan Life Ins. Co., 447 F.2d 1293. (5 Cir. 1971). In a case such as we have here, where shards of evidence have been produced on opposite sides of almost every issue, jury exile should be almost as rare as a museum piece. Boeing Co. v. Shipman's guidelines are as engrained upon our jurisprudence as Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188. (1938). Its every precept and inference was not heeded in the trial below, and we must therefore reverse and remand. *Jone v Concrete Ready Mix Inc vWC* 464 F.2d 1323 (5th 1972)

United States of America v Davis,. 809 F.2d 1509, (11TH Cir, 1987) held:

> There is no evidence that directly contradicts the defendant's depiction of his mental state. We may disbelieve Davis' testimony, but we cannot say that it is so fantastic, speculative or inconsistent that it "falls of its own weight." *See* United States v. Generes, 405 U.S. at 107, 92 S.Ct. at 835. It is not uncommon to find that a defendant can muster only his own testimony to rebut circumstantial evidence of intent. We are unwilling to discount an explanation from the one person who can best describe the defendant's state of mind.
>
> Defendant stated a claim against Lenders for alleged intentional and negligent violation of section 1639(h). That is not to say that she has established her right to recovery, but we cannot say that "she is precluded from recovering as a matter of law." Hicks, 2004 OK 36, ¶ 5, 92 P.3d at 90 (citation omitted).

Admissibility of evidence and testimony

The law of evidence in federal courts favors a broad rule of admissibility and is designed to permit the admission of all evidence which is relevant and material to the issues in controversy, unless there is a sound and practical reason for excluding it. *Rule 43(a),* F.R.Civ.P.; *United States v. 60.14 Acres of Land*, 362 F.2d 660, (3 Cir.); *United States v.*

*Featherston*, 10 Cir., 325 F.2d 539

Title 12 O.S. 1981 § 2401 and Title 12 O.S. 1981 § 2402 support the Federal Rule. Apx 48a.

At the stage of a motion to dismiss or summary judgment, courts have determined that the question of the sufficiency of the evidence presented in support of lost-profits claims is properly for the finder of fact to determine. See, e.g., Fountain v. Lohan, No. 04-6778, 2005 U.S. Dist. LEXIS 23321, *20–21 (N.D. Ill. Oct. 11, 2005); Aamco Transmissions, Inc. v. Marino, Nos. 88-5522, 88-6197, 1992 U.S. Dist. LEXIS 2081, *12 (E.D. Pa. Feb. 20, 1992); PBM Prods. v. Mead Johnson & Co., 174 F. Supp. 2d 424, 429 (E.D. Va. 2001).

Bank pointing to Beshara's testimony at trial and in his deposition, insists that Beshara suffered no damages as a result of the Bank's dishonor of the checks. Considering all of his testimony as a whole, he did present evidence on other consequential damages such as the loss of use of his funds and mental pain and suffering caused by both the dishonor and the allegedly wrongful hold on his account. We find that this evidence was sufficient, under these circumstances, to overrule the Bank's demurrer and to submit the cause to the jury for a determination of whether Beshara suffered any damages which were proximately

caused by the alleged wrongful dishonor. 12A O.S. 1981 § 4-402 , page, §§§, Shaw v. Union Bank & Trust Co. 640 P.2d 953, 954 (Okla.1981); at note 12.

In Zokari, *supra,* the court said that it would decide the admissibility issue after counsel conducted a voir dire of witness Holland outside the jury's presence. During that procedure Holland stated he knew nothing to support the claimant. )

No such procedure was extended by the district court here.

## Motions in limine were not provided with statutory time to respond

Under the facts presented, the appellant should have been given an opportunity to respond to the appellees' motion to dismiss his counterclaim which the trial court treated as a motion for summary judgment. Oklahoma statutes requires that demuurer allow 15 days to answer. Beshara

Motions in Limine was proffered on 2/23/2009 allowing only 14 days until trial date scheduled for 3/9.

Since the rulings on the Motion in Limine as well as other rulings eliminating witnesses and damages was not made until one business day before the trial or during trial, Petitioners did not have adequate opportunity to respond or to revise the schedules to reflect those decisions.

## Improper Exclusion of Owner's Testimony

In its March 6th pre-trial ruling the court itself recognized the basis for allowing Petitioner's testimony under Rule 701 stating "some limited[9] exceptions for owner testimony"(See Apx51-52a)

then excluded it on manufactured premises neither proposed nor in evidence.

The court arbitrarily classified Petitioner's damages as projections of profits from future sales, rather than, as presented , based on proceeds determined by comparable sales in the past at expected time sales would have occurred but for Respondent's acts delaying such sales. This ruling in addition to being circular ignores or misconstrues the evidence. Apx52a

It is unknown how either court could exclude the "excess expenses" that were actual amounts and unrelated to the improper exclusion related to property values

Evidence presented below

1 Houses:

Property values were established at a particular time in 2004, anticipated sales dates were shown on

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[9] Petitioner finds no limiting factors.

the damage schedules on a consistent basis. This determination was based on actual comparable sales at those times, i.e., anagous to hindsight as opposed to the court's classification of "future sales".

It is undeniable that Petitioner's ownership of those (vacant) former family residences for periods of 10-30 years provided intimate knowledge of the costs involved with them as well as their values

It doesn't take a genius to know when a property is sold any existing mortgage is paid off. Therefore the mortgage payments including interest charges disappear. Neither is it beyond the understanding of the ordinary layperson that the recurring expense of real estate tax, insurance, or other costs unavoidably associated with ownership would also cease with the sale

The costs claimed ("excess expenses") are those actual, usual, customary, unavoidable costs incurred by the forced holding of the properties

The damage schedules were provided several times during the litigation, each time updated with ongoing ownership costs incurred.

Proof of the amounts incurred was provided to Respondent

The courts arbitrarily characterized ownership of (vacant) former family residences as a "business".

Getting ready for sale costs were not charged to Respondent, did not affect the selling price and did reduce the cash available for re-investment earnings calculation.

No costs of ownership incurred before the planned sale date were included.

Profit is an inappropriate reference as that would be net sales proceeds minus fixing up costs and original purchase price.

The damages schedules did not include any projected or estimated losses caused by increased costs to ready for sale or decline in selling price due to the delay. These claims would fit the court's label of "future sales" whereas damage calculations were based as stated herein.

While the court argues that Petitioner cannot be permitted to value the property, it conveniently directs us to Malloy v. Monahan, 73 F.3d 1012, 1016-17 (10th Cir. 1996).

When correctly cited, Malloy is more supportive than adverse, holding:

> We review the district court's determination of the admissibility of exhibits for a clear abuse of discretion. State Office Sys., Inc. v. Olivetti Corp. of Am., 762 F.2d 843 (10th Cir.1985. We first determine whether the exhibit had a proper foundation. ...the first portion of the exhibit, detailing... the projected sale prices of the two houses owned by Malloy at the time of the incident, is admissible. As owner of the houses, Malloy was qualified to testify regarding their value because of his special knowledge of the properties. See United States v. 10,031.98

Acres, 850 F.2d 634, 636 (10th Cir.1988).
Malloy, supra at 636.

As here Malloy determined selling prices from comparable property sales.

It is distinguishable first because Petitioner was not buying distressed properties requiring significant and perhaps unknown repairs that dramatically altered values and secondly she was not claiming damages remotely resembling profit.

> Malloy also held "While we do not endorse Exhibit 15 as a model calculation of lost future profits, we conclude that it nonetheless passes muster under Fed.R.Evid. 701 or Fed.R.Evid. 702. The weight accorded to Malloy's figures was a question of fact properly left to the jury. *Id. Cf., United States of America, v 10,031.98 Acres Of Land* 850 F.2d 634 (Sharp could not be prevented from offering his opinion as to the value of his property even if he did not first establish in painstaking detail the accuracy of the process by which he arrived at that opinion.) [Emphasis added]

2 Development of the 40 acres

The values for the 40 acres differ from the houses only in two respects. Projected costs to develop had been provided by the Engineer. Petitioner spent significantly more time verifying the timing, selling price and development costs since it was important to

determine the potential profit before undertaking that project.

District court overruled counsel's pre-trial arguments as to her procedures. Apx 53-55a. Details of her research and ability to make that determination that were provided in the appeal but totally discounted by the Appellate.

That testimony would go to the weight, not admissibility as well.

### 3 Summary is admissible

> Rule 1006 clearly permits the use of a summary of voluminous business records.
>
> The president of the plaintiff corporation offered his projection of future profits lost as a consequence of the defendant's breach of contract. State Office Systems, *supra* at 845-846. . Given the president's knowledge of the type of business at issue and his position in the company, we ruled that he possessed sufficient expertise and personal knowledge of the company to render such an opinion. *Id.* at 846. Moreover, we found it significant that the defendant had ample opportunity to cross-examine the witness about the basis of his figures. Thus we concluded that the trial court properly admitted the president's projections as opinion testimony under either Fed.R.Evid. 701 or Fed.R.Evid. 702.
>
> *See United States v.Johnson)*, 594 F.2d 1253

*(9th Cir.1979)*), cert. denied, 444 U.S. 964, 100 S.Ct. 451, 62 L.Ed.2d 376 (1979*)*. (There is evidence in the record to lay a foundation for the summary of actual losses as a compilation of business records admissible under Rule 1006. Our decision in State Office Systems guides our disposition of this issue. ....The exclusion of this evidence affected plaintiffs' "substantial rights" within the meaning of Fed.R.Evid. 103(a).)

*"As for Ms. Knight, it is true that business owners may be qualified to testify about lost profits when (1) "the owners had sufficient personal knowledge of their respective businesses and of the factors on which they relied to estimate lost profits" or (2) "the owners offered valuations based on straightforward, common sense calculations." LifeWise Master Funding v. Telebank, 374 F.3d 917, 929-30 (10th Cir. 2004) (collecting cases).* Apx21a

The Appellate reference to LifeWise is over-ambitious and distinguishable. The complicated methods used there can in no way compare to Petitioner's listing of actual expenses and simple arithmetic used to arrive at anticipated cash flows. Additionally, the LifeWise officer admitted he had never used that method, whereas here Petitioner was adept at making such calculations and had personal knowledge of every amount presented.

*"But as the district court noted, Ms. Knight had no experience in land development and had never*

*conducted a business with respect to the vacant houses."*

*"But the district court did not abuse its discretion in holding that, on the admissible evidence before it, any lost profits from the sale of the rental houses and the development of the 40-Acre Parcel were not capable of reasonably accurate measurement or estimate." Apx22a*

Petitioner cannot conceive of any situation more accurate than actual amounts paid.

As to any remaining questions, such as the proposed month of sale or the exact development cost, the following are dispositive:

> In a case such as this, where the wrong is of such a nature as to preclude exact ascertainment of the amount of damages, plaintiff may recover upon a showing of the extent of the damages as a matter of just and reasonable inference, although the result may be only an approximation. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. *Story Parchment Co. v. Paterson Parchment Paper Co.*,-282 U.S.555 at 563, 51 S.Ct (1931). The wrongdoer may not complain of inexactness where his actions preclude precise computation of the extent of the injury. *Accord* Bangor Punta Operations, Inc v. Universal Marine Co., Inc., 543 F.2d 1107

(5th Cir. 1976), Eastman Kodak Co. v. Southern Photo Co., 273 U.S. 359, 379, 47 S.Ct. 400, 71 L.Ed. 684 (1927)., *Commonwealth Trust Co. of Pittsburgh v. Hackmeister Lind, Co.*, 181 A. 787, 790 (Pa. 1935) (It is "legalized robbery" to relieve any wrongdoer from liability because his wrongful act caused damages to be uncertain, and "substantial justice is better than exact justice.").

Although clearly defined damages are preferable, when the injured party can come before the factfinder and introduce evidence tending to show damages, a probable estimate of the amount in controversy will be allowed by inferential proof. Supra, Story Parchment at 564,cf., Miller v. Allstate Ins. Co., 573 So. 2d 24 (Fla. 3d D.C.A. 1990).

**An owner can testify as to the value of his property under Rule 701 or 702. Courts' opinion is in conflict with possibly every court in this great land, including its own state.**

Fed.R.Evid. 702 advisory committee note ("[W]ithin the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called 'skilled' witnesses, such as bankers or landowners testifying to land values.") (emphasis added).

A landowner who has known his land for years, or an expert witness who has acquainted himself with a piece of property, takes into account facts that he knows only by hearsay, or that for some other reason would not be admissible as independent evidence upon the examination in chief. If the witness' candid admission that he has considered such matters destroys his testimony, only a dishonest or an ill-informed witness can give an admissible opinion about the value of property.' "*LaCombe v. A-T-O, Inc.*, 679 F.2d 431, 435 (5th Cir.1982) . Here, the judge directed a verdict after improperly excluding plaintiffs' only evidence on an essential element of its case. The exclusion was clearly prejudicial. *Id*

[T]he opinion testimony of a landowner as to the value of his land is admissible without further qualification. *Id.* at 433 (5th Cir.1982); And, "[i]t would totally emasculate the rule that an owner is always qualified to testify as to the value of his property to turn around and require a threshold basis for that testimony before it may be admitted." *Id* at 434-35.]

The trial court refused "to admit Lacombe's testimony "based at least in part on depreciation schedules as to the accuracy of which he was not qualified to testify." *Id.* at 434. The Fifth Circuit reversed noting: "The basis of Lacombe's value testimony goes to its

weight ... not to its admissibility.... *Id*

[A]ppellant attacks the probative value of this testimony on the grounds that it was not based on any accepted method of valuation, but this overlooks the fact that the opinion testimony of a landowner as to the value of his land is admissible without further qualification. *Id.* at 435 (citations omitted) (emphasis in original); see also *Baltimore Am. Ins. Co. v. Pecos Mercantile Co.*, 122 F.2d 143, 147 (10th Cir.1941) Its weight was for the jury.");

The District of Columbia Circuit has implied that admissibility of owner value testimony should be even more favored than expert testimony in general. In *District of Columbia Redevelopment Land Agency v. Thirteen Parcels of Land*, 534 F.2d 337,338 (D.C.Cir.1976), The majority of the panel on appeal concluded that the landowner should have been permitted to testify as to the value of his property even though his opinion was based in part on his experience with the non-comparable property..

Furthermore, in testifying as to the value of his property the owner is entitled to the privileges of a testifying expert. Lacombe at 434. see also *United States v. Laughlin,* 804 F.2d 1336, 1341 (5th Cir.1986) (owner's testimony is expert opinion under Fed.R.Evid. 702); *Robinson v. Watts Detective Agency*,

685 F.2d 729, 739 (1st Cir.1982) (owner allowed to give estimate of property value based in part on hearsay); *Kestenbaum v. Falstaff Brewing Corp.* Falstaff Brewing Corp., 514 F.2d 690, 698 (5th Cir. 1975), cert. denied, 424 U.S. 943, 96 S.Ct. 1412, 47 L.Ed.2d 349 (1976) (quoting Fed.R.Evid. 702), cert. denied, 424 U.S. 943, 96 S.Ct. 1412, 47 L.Ed.2d 349 (1976).

The Kestenbaum court held: "However, whether present evidentiary rules or the new Federal Rules are applied, Kestenbaum's estimation of the sum of the above valuation elements will be admissible since under both an owner is competent to give his opinion on the value of his property. This rule, established by the weight of present authority has now been codified in Rule 702 of the new Federal Rules of Evidence. Rule 702 provides: "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify (to specialized knowledge) in the form of opinion or otherwise."",;(*e. g., Berkshire Mutual Ins. Co.v. Moffett*, 378 F.2d 1007 (5th Cir. 1967); *Lee Shops, Inc. v. Schatten-Cypress Co.*, 350 F.2d 12 (4th Cir.), cert. denied, 382 U.S. 980, 86 S.Ct. 552, 15 L.Ed.2d 470 (1965); *Hartford Fire Ins. Co. v. Cagle*, 249 F.2d 241 (10th Cir. 1957); Lawton v. Strong, 249 F.2d 299, 302 (6th Cir. 1957); *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354 (9th Cir.

1947) .

In *Robinson, supra*, the district court permitted Sullivan to testify to his opinion on the value of the business because, as president and majority stockholder, he was the owner of the property. The court noted that this opinion testimony of an owner is admissible either as an opinion by a lay witness "based on ... personal perception" and "helpful to a clear understanding of his testimony or the determination of a fact in issue" under [Federal] Rule [of Evidence] 701, or as an expert opinion by one who is "qualified as an expert by knowledge ... [or] experience" under Rule 702. *See also Arkansas State Highway Commission v. Russell, 240 Ark. 21, 398 S.W.2d 201, 202 (1966)*

The problem with the district court's refusal to allow Sharp to offer his opinion as to value unless he complied with the standards required of an expert appraiser, is that an expert appraiser does not have the familiarity with the subject property that an owner is presumed to have. Despite the informal comparison that is involved in such a process, the standard federal rule is and has been that a landowner may testify as to the market value of his own property *United States v. Sowards,* 370 F.2d 87, 92 (10th Cir. 1966) .

**Testimony goes to the weight of the**

**evidence, not to admissibility.**

> See State Office Systems *supra* at 845 holding appellant's objections go more to the weight of the evidence than to its admissibility. The weight to be accorded appellee's figures was a question of fact properly left to the jury.
>
> Whether or not [an owner's opinion as to the value of his property] opinion is accurate goes to the weight of the testimony, not its admissibility *Robinson v. Watts*, at 739 supra . *See Meredith v. Hardy*, 554 F.2d 764, 765 (5th Cir. 1977) *Cf. Ford Motor Co. v. Webster's Auto Sales, Inc.*, 361 F.2d 874, 886 (1st Cir. 1966); *J & H Auto Trim Co. v. Bellefonte Ins. Co.*, 677 F.2d 1365, 1369 (11th Cir.1982) ("[A]n owner of property is competent to testify regarding its value. 'The weight of such testimony is, of course, affected by the owner's knowledge of circumstances which affect value, and as an interested witness, it is for the jury to evaluate the credibility of his testimony.' "); *Thirteen Parcels of Land*, (D.C.Cir.1976) ("In these circumstances, we believe that such factors as the differences in size, frontage and location of the two properties go to the weight of the owner's testimony regarding suitability and not to its admissibility.")
>
> "This testimony is then 'subject to attack

> through cross-examination or independent evidence refuting the owner's estimate ..., with the jury as fact-finder shouldering the responsibility of judging the credibility of the witness, resolving the conflicting evidence, and assessing the weight of opinion testimony. .Lacombe *supra* at 1290, *See* Kestenbaum, supra, at 699. (citations omitted). *Accord Dietz v. Consolidated Oil & Gas, Inc.*, 643 F.2d 1088, 1011(5th Cir.), cert. denied,U.S. 102 S.Ct. 513, 70 L.Ed.2d 385 (1981)

District court ruling is also wrong regarding method of establishing value:

The courts essentially ignored counsels pre-trial supporting arguments. Apx51-55a.

THE COURT: "Well, insofar as it relates to the evidentiary question, I understand your position, but I'm nonetheless of the opinion that I think she's going out to look at comparables and drawing information from other experts and so on, that process I think takes it outside the scope of what 701 contemplates as proper lay testimony." Apx55a

> It should also be noted that evidence of comparable sales is admissible either as direct proof of value or in support of the opinion of an expert,. *Featherston*, supra, and, while an important factor in the determination of market value, does not affect the admissibility

of other relevant evidence on the question.

Cases show clearly an owner can testify as to the value of his owned property whether owned individually or testifying as a company official based on comparable sales or other methods. Further he cannot be excluded even if there are no comparable properties to base his values on. The admissibility goes to the weight of the testimony and is for the jury, not the court, to decide as to the reliability of the assigned value.

> And we stated in *Sill Corp. v. United States*, 343 F.2d 411, 416, (10 Cir.,1965) cert. denied 382 U.S. 840, 86 S.Ct. 88, 15 L.Ed.2d 81(1965):We know, of course, that the law is not wedded to any particular formula or method for determining fair market value as the measure of just compensation. *See United States v. Miller*, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336; (1943) *See alsoSowards, supra* at 401 It may be based upon comparable sales, reproduction costs, capitalization of net income, or an interaction of these determinants.'

In recognizing the difficulties of establishing market value in cases where there are no comparable sales, the Supreme Court, in *United States v. Miller*, supra at 374, 375 stated:

> 'Where, for any reason, property has no market resort must be had to other data to ascertain its value; and, even in the ordinary case, assessment of market value involves the

use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety. It is usually said that market value is what a willing buyer would pay in cash to a willing seller. Where the property taken, and that in its vicinity, has not in fact been sold within recent times, or in significant amounts, the application of this concept involves, at best, a guess by informed persons.

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. The sovereign must place the owner in as good a position pecuniarily as he would have been had his property not been taken. United States ex rel. and for Use of T.V.A. v. Powelson, 319 U.S. 266, 63 S.Ct. 1047, 87 L.Ed. 1390; United States v. Cox, 10 Cir., 190 F.2d 293, cert. denied 342 U.S. 867, 72 S.Ct. 107, 96 L.Ed. 652. Just compensation is measured by the market value of the property at the time of taking. *Miller*, at 336, supra ; *Olson v. United States*, 292 U.S. 246, 54 S.Ct. 704, 78 L.Ed. 1236 (1934); *United States v. Featherston*, supra ; *Harwell v. United States*, 10 Cir., 316 F.2d 791; *United States v. Silver Queen Mining Co.,* 285 F.2d 506, (10 Cir. 1960); 27 Am.Jur.2d, Eminent Domain 267. The federal concept of market value is intimately related to selling price on the market, and it is generally recognized that the best evidence of market value is

found in sales of comparable property within a reasonable time before taking; but the determination is not limited to that method. *United States v. Toronto Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 70 S.Ct. 217, 94 L.Ed. 195 (1949); *Miller*, supra; *Sowards.* , supra; *Harwell* , supra; *Onego Corp. v. United States*, 295 F.2d 461 (10 Cir. 1961); *Silver Queen Mining Co.*, supra.

The lack of comparable sales does not change the measure of compensation; other evidence may be sufficient for the determination of value. *Toronto Hamilton & Buffalo Nav. Co.*, supra; *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 *Silver Queen Mining Co.*, supra, Kestenbaum, supra .

The court abused its discretion in making this clearly erroneous ruling.

The court's decision was arbitrary and manifestly unreasonable, not in accordance with principles discussed herein and against the interest of justice.

**The case presents an opportunity for this Court to resolve that expert testimony is permissible as to the computation of numerical values and summaries that are helpful to assist the fact finder, based on data and reports, not of his own making and to which he is**

**not testifying as to their truth, provided he has the skills to perform such calculations, without requiring him to prove the underlying data.**

## Improper exclusion of Expert testimony

*"Phoenix designated Dr. Horrell to testify not only about the 40-Acre Parcel but also about excess expenses that Phoenix had incurred and the lost rental income from the Shopping Center due to the inability to refinance. But the district court limited his testimony on these other matters to mathematical calculations.". Apx8a*

Dr. Horrell's report calculations included the damages claimed by both parties. This was necessary due to the interdependency of the uses of the receipts derived from the included activities of the parties. Inasmuch as the parties were claiming a loss of investment earnings from the pooled cash generated from all activities the sources and uses of cash as listed on individual sheets were summarized, by periods, to determine the amount available to first

retire the refinanced debt and then to re-invest.

The Experts testimony was not intended to confirm factual evidence of Respondents' acts or omissions or that Petitioner's goals would have been achieved. Dr. Horrell's role in this litigation was to offer the opinion that, assuming the presented scenario, the Petitioner would have earned a minimal amount on the remaining proceeds.

Although the Appellate fails to mention it, the district court's opinion was partially based on Respondents argument that the expert had no real estate experience and therefore could not make a proper analysis.

> Similarly, where the plaintiffs, Mexican nationals, had been defrauded in a U.S. real estate development scheme, the court allowed an economist with no real estate development expertise to testify as to the amount the plaintiffs would have earned if they had invested the same amount in an average American real estate investment trust (REIT).*Maiz v. Virani,* 253 F.3d 641, 665 (11th Cir. 2001); cf. *Computer Sys. Eng'g, Inc. v. Qantel Corp.*, 740 F.2d 59 (1st Cir. 1984) (holding that a CPA could testify as to lost profits where testimony consisted of extrapolating from forecasts made by the adverse party); *Beverly Hills Concepts, Inc. v. Schatz & Schatz*, 717 A.2d 724, 733 (Conn. 1998) ("Some economists' and accounting professionals' skills may be transferred

between industries.")

> Once it was established that the measure of damages was the profits that would have been earned on such an investment, calculating those profits was something that an economist, even an economist without specialized experience, was well qualified to do. See *Maiz*, *supra* at 665; cf. *Durflinger v. Artiles*, 727 F.2d 888, 892 (10th Cir.1984). held Rule 703 "permits an expert to base an opinion on any facts or data, admissible or not, which are of a type reasonably relied on by experts in the particular field" *Id.*
>
> Further, a Dec. 1, 2000 amendment to even lets the inadmissible hearsay be disclosed to the jury if the trial judge finds that the probative value of assisting the jury to evaluate the expert's opinion outweighs the risk of prejudice from the jury's potential misuse of the information.

The reality of possibly more than a half dozen educated attorneys' claimed failures to understand the schedules lends support to the fact that Dr. Horrell would provide impartial assistance to the jury, if needed.

Kuhmo alters the referred to Daubert factors as applicable to the proposed testimony discussed herein.

" We agree with the Solicitor General that "[t]he factors identified in Daubert may or may not be

pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." Brief for United States as Amicus Curiae 19. The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in Daubert, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue. "

> In some situations, courts should be willing to allow experts to testify on the basis of their general background in a field such as accounting or economics. For example, where the projected revenues and expenses are already in evidence and the expert merely needs to calculate the profits so as to come up with a number that is comprehensible to the jury, an accountant with no expertise in the industry in question would be perfectly capable of rendering an opinion as to the amount of profits the plaintiff has lost. *See, e.g., In re Merritt-Logan, Inc.*, 901 F.2d 349, 360 (3 d Cir. 1990) (stating that a CPA could testify as to how lost profits were calculated where he did not express an opinion on underlying projections); *cf. Supply & Bldg. Co. v. Estee Lauder Int'l, Inc.*, 57 Fed.R.Evid. Serv. (West) 1309, 1312 n.3, 1316 (S.D.N.Y. 2001) (finding that an accountant without relevant experience in the Middle East was

> qualified to testify as to the opposing expert's mathematical and accounting errors).
>
> See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592, 113 S.Ct. 2786, 2796, 125 L.Ed.2d 469 (1993) (noting that experts, unlike ordinary witnesses, are permitted to offer opinions not based on first-hand knowledge or observation).

Based on the testimony being offered, the arguments presented as supporting the ruling are not applicable. However, Petitioner discusses procedures taken their applicability to law that justifies the admission of the expert even if his testimony had been to verify the underlying facts.

It is believed the court confused the issues and that the arguments were actually aimed more at the Phoenix case in regard to projected net profits based on the experts' reliance on the appraisal report.

> As shown herein Petitioner was qualified to testify as to the value of property she owned. Therefore, the expert is permitted to rely on the property owner's valuation. *See Featherston, supra*(It should also be noted that evidence of comparable sales is admissible either as direct proof of value or in support of the opinion of an expert, supra, and, while an important factor in the determination of market value, does not affect the admissibility of other relevant evidence on the question.)

*See United States v. Rodriguez-Felix,* 450 F.3d 1117, 1124-1125 (10th Cir 2006 (stating that "[w]e [have] rejected a per se rule excluding such expert testimony"), cert. denied, 549 U.S. 968 (2006); accord, e.g., *United States v. Martin,* 391 F.3d 949, 954 (8th Cir. 2004) (reviewing for abuse of discretion). ("while cross-examination is often effective, expert testimony, when directed at complex issues, may provide a more effective tool for rebutting an eyewitness's testimony

*"And as to the calculations of expenses, the district court did not abuse its discretion in disallowing testimony that would simply adopt and confirm what Ms. Knight had said. Cf. Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073(10th Cir. 2006) (it was not "'manifestly unreasonable' for the district court to conclude that [the expert's] opinions lacked foundation because they were based on 'the self-serving statement[s] of an interested party'") .Apx11a*

This case is not "comparable to" Champagne where the court excluded the expert since his report was based on a different market than the claim was based on and he offered no explanation as to why. Further the report conclusively stated that Champagne "experienced difficulty acquiring sales persons" based on owners statement. but "had not spoken with a single potential sales person who declined an offer." Proofs in that antitrust case relied mostly on intangibles whereas the instant case is fact based supported by documents. This argument

applies equally to Appellate's other cites.

*"As for the alleged excess expenses, the court noted that "the listing of 'excess expenses' incurred by defendants is based entirely on information defendants provided to Dr. Horrell." Id. at 164. The court was concerned that Dr. Horrell would testify "that defendants' estimates of future real estate sales activity or of 'excess' expenses or the like are reasonable. Id. at 166."*Apx9a

It is not surprising that Dr. Horrell would adopt Petitioner's list of expenses. Every case must start with the victims' assertions of injuries. In this case since that is the only source of information it begins and ends with that list. That those costs were incurred is proved by presentation of bills and payments made. Inclusive relevancy is sustained by common sense and logic. There is no blown tire, no defective product, no manufacturer to consult, no medical procedure to question, no scientific studies. The damages presented are analagous to medical bills arising from an injury, or property destroyed by a fire.

It is also absurd to state that the expert cannot testify based on Petitioner statements because they are self-serving. All witnesses testifying on their own behalf would be self-serving.

Under Rule 702 of the Federal Rules of Evidence, an expert qualified by "knowledge, skill, experience, training or education" may give testimony that will assist the trier of fact to understand the evidence or to determine a fact in issue. These twin pillars of

"qualifications" and "helpfulness" inevitably mean that expert testimony often will be comprised of, or reliant upon, large chunks of "hearsay" information developed or written by others

The en banc opinion of this Court in *United States v. Williams*, 447 F.2d 1285 (5th Cir. 1971), cert. denied, 405 U.S. 954, 92 S.Ct. 1168, 31 L.Ed.2d 231 (1972), summarized the law as follows:

> "Expert witness testimony is a widely-recognized exception to the rule against hearsay testimony. It has long been the rule of evidence in the federal courts that an expert witness can express an opinion as to value even though his opinion is based in part or solely upon hearsay sources. " *See United States v. Alker*, 260 F.2d 135, (3 Cir., 1958); *v. United States*, 5 Cir., 1965, 346 F.2d 775, 779-780, cert. den. 382 U.S. 963, 86 S.Ct. 449, 15 L.Ed.2d 366; *Brown v. United States*, 1966, 126 U.S.App.D.C. 134, 375 F.2d 310, 318; *H & H Supply Co. v. United States*, 194 F.2d 553, (10 cir. 1952). The rationale for this exception to the rule against hearsay is that the expert, because of his professional knowledge and ability, is competent to judge for himself the reliability of the records and statements on which he bases his expert opinion. Moreover, the opinion of expert witnesses must invariably rest, at least in part, upon sources that can never be proven in court. An expert's opinion is derived not only from records and data but from

education and from a lifetime of experience. Thus, when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise. Williams, supra, 447 F.2d at 1290 (footnote omitted).

In H&H, *supra* The testimony of [the petroleum engineers] with respect to the sources of their information was not offered for the purpose of establishing the truth of the information received by them. They were testifying as valuation experts and the sole purpose of this testimony was to establish the sources upon which they relied in reaching their conclusions as to value.

In *George Lee Mims v United States of America*, 375 F.2d (1967) On the other hand, one of the most generally accepted rules in all jurisprudence, state and federal, civil and criminal, is that the questions of the credibility and weight of expert opinion testimony are for the trier of facts, and that such testimony is ordinarily not conclusive even where it is uncontradicted. (See Note 2 Collecting cases) The Supreme Court of the United States has said that the trier of the facts is not limited to a compromise and balancing of opinions of expert witnesses in reaching its decisions

*It is clear," said the court, "that Dr. Horrell has neither undertaken any systematic investigation or independent analysis of the reasonableness of what defendants claim as their excess expenses nor has a basis for assessing the reasonableness of defendants' projections . . . ." Id. at 171 (footnote omitted). The court concluded: "His relatively limited efforts at verifying whether Ms. Knight has some document or basis for the estimates she makes fall far short of providing a basis for [him] to opine that the estimates or projections are reasonable. He therefore cannot take Ms. Knight's estimates and present them in such a way as to make them sound like they are his. Id".. Apx9a*

*We review the district court's determination of the admissibility of exhibits for a clear abuse of discretion. State Office Sys., Inc. v. Olivetti Corp. of Am., 762 F.2d 843 (10th Cir.1985. We first determine whether the exhibit had a proper foundation. Malloy, supra at 636*

As discussed above, Petitioner was entitled to testify as to the selling price, the "excess expenses" were actual not speculative, and refinance terms were known. These facts form an acceptable basis for the economist to determine the impact of the delays on cash flow and re-investment earnings.

There was no defect in the methods or procedures used to verify the schedules provided by petitioner. Verification was strictly a matter of simple arithmetic. Interest owed on notes was provided on spreadsheets and supported by 1098s issued by the

note holders. Other 'excess expenses' were the amounts actually incurred, supported by invoices and printouts of the providers accounts, in most cases showing up to two years per printout.

Any investigation of the amounts included is no more difficult that viewing the bills and payments on each property. The reasonableness of the amounts is not at issue since they are the amounts charged by the creditor and not subject to the control of Petitioner.

Dr. Horrell randomly chose amounts and was shown the invoice/payment records. Due to the limited types of expense and the proofs an exceptionally high percentage of costs were thus verified. The fact that Dr. Horrell later failed to reveal the exact documents viewed is insufficient to conclude that he did not make adequate verification of the "excess expenses".

In fact the court had personal access to many of those records. The Petitioner, on counsel's instructions these proofs were needed at the pre-trial hearing, left copies of several hundred documents spanning 5 years with the Judge's clerk on March 6 and those records were returned to counsel at the close of the trial

An independent analysis of the reasonableness of inclusion is only to ask, "Would any of these expenses continue to accrue after the sale of the property? Are any of those costs avoidable during the period of ownership? Since the answer to both questions is "No", it is obvious that they are costs incurred that

would not have accrued except for the forced delay in selling them due to Respondents acts.

If petitioner did not have the expertise to prepare the schedules, it is apparent that the expert would have prepared them himself in a similar fashion. The court's decision infers that if the expert can find no fault with Petitioner's reasoning and calculations, then they must be unreliable.

As to the calculations of cash available, Dr. Horrell did not totally accept Petitioner's summary. His report and calculations arrived at different amounts of lost profits from the shopping center after his review of the appraisal report, the included listing of local shopping center rates and Phoenix history. He employed his own method of arriving at the additional cash that would have been available for re-investment. He provided his own calculation of re-investment earnings using three rates for jury's choice. One only has to review Petitioner's summary to see the differences.

Under the principles stated herein, the court had no reasonable basis to exclude his testimony.

Inclusion Of Reports By Others

*"Phoenix contends that Dr. Horrell was qualified to offer the opinions that he submitted; that he was entitled to make assumptions, provided those assumptions could be proved at trial; and that he had tested his information against the actual facts as they became known. Because Phoenix does not claim that "the district court failed to employ the proper legal*

*framework required by Daubert, we consider only whether the district court abused its discretion in actually applying this framework to the testimony at hand." United States v. Rodriguez-Felix, 450 F.3d 1117, 1125 (10th Cir. 2006) supra at 1125. Apx10a*

*Again, although Phoenix did not argue Daubert factors, Petitioner did.*

*"The district court did not abuse its discretion in limiting Dr. Horrell's testimony. Fed.R.Evid. 702 requires an expert's testimony to be "based upon sufficient facts or data" and to be "the product of reliable principles and methods" which have been "applied . . . reliably to the facts of the case."*

*"[N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997). .Apx11a*

Dr. Horrell was testifying only that assuming the underlying amounts were accepted as true that the cash available would have earned a certain amount by trial date. . It is unclear where there is a "gap" The court provides no insight to that allegation.

*"Under Daubert, any step that renders the analysis unreliable renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." Mitchell v. Gencorp Inc., 165 F.3d*

*778, 782 (10th Cir. 1999)) (ellipsis and internal quotation marks omitted)."* *Apx 10a*

> It should be clear, too, that a witness may be qualified to testify as to one aspect of the damages in a case and not as to others. A criminal case provides a vivid example. *State v. Roland,* 808 S.W.2d 855, 858–59 (Mo. Ct. App. 1991. *Cf. Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 782 n.1 (3d Cir. 1996) (admitting testimony of expert because requiring better qualified experts would "unjustly increase litigation costs by requiring litigants in countless cases to hire a host of experts . . . ").

*"The district court offered cogent rationales supported by the record for limiting Dr. Horrell to presenting numerical calculations regarding damages. Dr. Horrell's years of experience and other qualifications do not overcome the district court's concern about lack of independent investigation in this case". Apx11a*

> The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the non-moving party to carry its burden of proof. C*elotex v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986).

No evidence was provided to support a lack of independent investigation other than the Respondent's unsupported statements. The district

court abused its discretion in accepting those statements as opposed to Plaintiff's real evidence of expense receipts and the allowance of value testimony under Rules 701 or 702.

The decision was clearly erroneous due to the obvious failure to consider Petitioner's evidence and instead rely on Respondents contentions,-e.g. the allegation they had no documents. Respondents had ample evidence with which to verify those amounts themselves, hence their opposite claim the documents provided were too voluminous. In fact, Respondents objections were disingenuous since they had themselves procured evidence from county assessors and subpoenaed mortgagees' documents. Those amounts comprised the majority of the "excess expenses"

Petitioner cannot conceive of what additional investigation would satisfy the court. Secondly, since the expert was not testifying as to the validity of the schedules or the underlying data, it can be maintained that no action needed to be taken to render the type of opinion he was to make in this case.

*"See United States v. Nacchio, 555 F.3d 1234, 1258 (10th Cir.) (en banc), cert. denied, 130 S. Ct. 54 (2009) ("Although [the expert] generally has been permitted to testify in the past, and a district court might well respect his credentials, the court had an obligation to assess the methodology that [the expert] had employed in the case at hand."). Apx11a*

Expert may rely on other information.r

Cf. *Wilson v. Merrell Dow Pharmaceuticals, Inc.*, 893 F.2d 1149, 1153 (10th Cir.1990) (Information must be of a type reasonably relied upon by others in the witness' field of expertise.); *LaCombe*, supra at 434 United States v. Laughlin, 804 F.2d 1336 (5th Cir.1986) J. Weinstein & M. Burger, Weinstein's Evidence 703[03] at 703-25 (1988) (The rule implicitly requires that the information be viewed as reliable by some independent, objective standard beyond the opinion of the individual witness.

It was unreasonable for the courts' determination that experts could not rely on the Petitioner's bills. They are no different than bills paid in a personal injury case.

*See, e.g., Wharfside Two, Ltd. v. W.W. Gay Mech. Contractor, Inc., 523 So. 2d 193, 195 (Fla. Dist. Ct. App. 1988)* (holding that the use of projections in consummating financing made them reliable enough to support a jury verdict).

The individual schedules of expenses paid or accrued, the summary adding these up and the calculation of cash flow created by Petitioner were not beyond the understanding or professional judgment of Dr. Horrell.

In *Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114 (10th Cir.2005), we held that Rule 603 permitted a lay witness to testify about the contents of a list of audit reports. As we explained, "[s]ince [the witness] personally examined these (*Id.* at 1123) audit reports, she had personal knowledge of their content."

Moreover, we have also held that "[t]he standards [of personal knowledge] applied to lay and expert witnesses differ. In particular, Rule 703 "permits an expert to base an opinion on any facts or data, admissible or not, which are of a type reasonably relied on by experts in the particular field" Durflinger v. Artiles, 727 F.2d 888, 892 (10th Cir. 1984) (emphasis added) (internal quotation marks and citation omitted). ."

How one characterizes the "type" of data also affects whether it is of a type reasonably relied upon by experts in the field. Real estate appraisers commonly rely upon comparable sales. *See Cayuga Indian Nation of N.Y. v. Pataki*, 83 F. Supp. 2d 318, 324–25 (N.D.N.Y2000).

Some courts have said that relying on

> projections supplied by a client is not cause for excluding the testimony but is something that can be corrected on cross-examination. *See, e.g.*, *PRS Benefits, LP v. Cent. Leasing Mgmt., Inc.*, No. 3:03–CV-1183-B, (2004) U.S. Dist LEXIS 24135, at *4–6 (N.D. Tex. Nov. 29, 2004) (holding that a CPA's failure to verify data provided by a health plan administrator could be dealt with by presenting evidence as to its lack of reliability); *In re Tasch, Inc.*, No. 97-15901 JAB, 1999 U.S. Dist. LEXIS 12368, at *1, *10–11 (E.D. La. Aug. 4, 1999) (admitting the testimony of an expert as to profits lost on breach of contract in spite of an admission by the expert that he "made no effort to verify the financial information provided by his client").

It is also important that Petitioner was available to testify about the underlying facts whereas in some cases expert testimony was denied because the provider of the data was not called as a witness and not subject to cross examination.

> It is arbitrary, capricious, unrealistic, and unreasonable to suggest that actual invoices and other documents as detailed by Petitioner are not of the type experts, in every field, typically use when any type of costs are a part of the damages calculations.

The courts' decision departs from this court, it's own and likely every other circuit and state.

## The simple pleading code does not require separately stated claims-only notice

Rule 8(a), Fed.R.Civ.P. provides that pleadings are to be construed liberally.

> The Supreme Court summarily vacated the Tenth Circuit decision, observing: Federal Rule of Civil Procedure 8(a)(2) requires only " a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only "'give the defendant fair notice of what the claim is and the grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 127 S.Ct. 1955, 1964 L.Ed.2d 929(2007) (slip op., at 7-8) (quoting *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). And Federal Rule of Civil Procedure 8(e states that "[p]leadings must be construed so as to do justice."See Erickson, 127,S.Ct. at 2200

The Federal Rules rejects the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accepts the principle that the purpose of pleading is to facilitate a proper decision on the merits." According to rule 8(f) FRCP7 all pleadings shall be construed to do substantial justice."

> Rules on pleading both at trial and at the appellate levels have been liberalized to allow

the courts to focus its attention on the substantive merits of the dispute rather than upon procedural niceties. *Markwell v. Whinery's Real Estate, Inc.*, 869 P.2d 840, 842 (Okla. 1994)). Under our liberalized pleading code, although double recovery may not be permissible, parties are allowed to set forth statements of claims alternatively or hypothetically and rely on inconsistent theories rather than to elect a single legal theory. *Howell v. James,* 818 P.2d 444, 447 (Okla. 1991)), *See*, 12 O.S.Supp. 1987 § 2008 (E)(2). Gay v. Hartford Underwriters Ins. Co., 904 P.2d 83, 86-87 (Okla. 1995); Hampton v. Hammons, 743 P.2d 1053, 1057 (Okla. 1987); Maule v. Indep. School Dist. No 9, 714 P.2d 198, 202 (Okla. 1985). *See also Beshara, supra,* (Under this standard, we need not consider any of the Bank's evidence that it was justified in placing a hold on Beshara's checking account or that it was justified in continuing to withhold his funds. That is precisely the question for the jury to answer after it considers all of the evidence presented by both parties)

We note that it appears that the Bank argues that Beshara should be precluded from asserting any errors relating to any of his alternative theories other than wrongful dishonor because he allegedly did not seek reconsideration of the trial court's order ...However, we find the Bank's argument is

without merit. The record reflects that Beshara continually attempted to assert his alternative theories of recovery and to present evidence relating to those theories both prior to and at the time of trial, but the trial court limited his cause of action to wrongful dishonor."

Demurrer to evidence sustained only when entire absence of proof The question of proximate cause is one of law for the trial court only if no evidence has been produced from which a jury could reasonably find a causal link between the negligent act and the injury or where the facts are undisputed. T*hompson v. Presbyterian Hosp., Inc.*, 652 P.2d 260, 263 (Okla. 1982); Woodward v. Kinchen, 446 P.2d 375, 378 (Okla. 1968);

Otherwise, the proximate or contributing cause of a plaintiff's injury is a question of fact for the jury. *Thompson v. Presbyterian Hosp., Inc., see note 17,* supra; K*imery v. Public Service Co. of Oklahoma*, 622 P.2d 1066, 1070 (Okla. 1981); *Harbour-Longmire Bldg. Co. v. Carson* 201 580, 208 P.2d 173, see note 15, supra. "While the question of proximate cause of an injury is always for the jury, violation of the foregoing ordinance would constitute negligence per se. *See also,* R*iss and Co. v. Reed*, 301 P.2d 208, 210 (Okla. 1956) "where this Court states that the question of proximate cause is always for the jury to determine." *Gay v. Hartford*

*Underwriters Ins. Co.*, 904 P.2d 83, 86-87 (Okla. 1995); "proximate cause is for the jury negligence per se" Accord, *Hampton v. Hammons*, 743 P.2d 1053, 1057 (Okla. 1987))

Dismissal of Claims

*"In her summary of argument Ms. Knight also mentions the dismissal of her claim for intentional infliction of emotional distress, which the district court dismissed on the merits. But because her brief does not develop the issue beyond this cursory identification, we consider it waived. See Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 679 (10th Cir.1998) ("Arguments inadequately briefed in the opening brief are waived.")." ..Apx18aNote4*

The factual circumstances surrounding Scroggs' alleged wrongful conduct, part of which was claimed to be fraudulent, a fact-finder "could ... reasonably infer that emotional distress was a natural and probable consequence of Scroggs' [wrongful/fraudulent] action." Worsham v Nix, 83 P.3d,879, 888, ¶ 27 CIV APP 2 (OK 2004).

*"Ms. Knight argues that the district court should have allowed her to pursue claims of negligence per se, usury, conversion, fraud, unjust enrichment, and violation of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (FDCPA).4 These claims fall into two categories: (1) claims that were asserted initially, but were dismissed with leave to amend and not reasserted (or at least not timely reasserted); and (2) claims that apparently never were asserted (or at*

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*least never asserted properly)." ...Apx18a*

*"Ms. Knight's state complaint asserted claims for conversion and deceit. The district court dismissed this complaint in its entirety because it failed to show how Ms. Knight's damages were different from Phoenix's; but the court granted Ms. Knight leave to file an amended complaint. The court did not indicate that any particular claim was ineligible for repleading. Yet neither the amended complaint nor the second amended complaint reasserted claims for conversion or deceit."*Apx19a

*"An amended complaint supersedes a prior complaint "and renders it of no legal effect." Davis v. TXO Prod. Corp., 929 F.2d 1515, 1517 (10th Cir. 1991)) (internal quotation marks omitted). When a claim has been dismissed on the merits, a party may file an amended complaint omitting that claim without waiving an appellate challenge to the dismissal. See id. at 1517-18. But the district court's order in this case did not "conclusively rule[]" on the conversion or deceit claims. Id. at 1518. The court simply noted that Ms. Knight had to plead individual damages if she wished to assert individual claims. All the claims in the original complaint were dismissed for the same reason; nothing in the district court's order suggested that the additional allegations needed to state one of the claims properly would not also cure the defect in the other claims. Hence, there was no compulsion from the court to abandon any particular claim. Yet rather than repleading the conversion and deceit claims, as allowed by the district court, Ms. Knight filed a second amended complaint that did not*

*include them. The omission resulted in abandoning these claims." Apx19-20a*

*"Finally, it does not appear that Ms. Knight ever properly tried to assert claims for negligence per se, usury, unjust enrichment, or violation of the FDCPA. None of these claims was included in the removed state complaint, the amended complaint, or the second amended complaint. Negligence per se and unjust enrichment were raised in the amended final pretrial report, but as we have just discussed, the district court ruled that the pretrial order could not revive or expand the claims at issue, and Ms. Knight does not appear to challenge the refusal to allow an eve-of-trial amendment. Thus, there was no reason for the district court to instruct the jury on those claims."* Apx20-21a

The Appellate is clearly wrong in this statement. Conversion, unjust enrichment, usury ,(Apx 239a, 247a-Items 20,60-62)and violation of FDCPA (inferred) and negligence (Apx241-244a) were included in the second amended complaint Mention of a claim should be considered whether listed as a claim or a theory In fact, Mooring proffered limited arguments opposing at least some of these charges and attempted to influence the fees award based on defending all of claims. Damages from these claims are self supporting and not affected by the courts exclusionary decision discussed herein.[10] The

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[10] The calculation of the usurious charges was listed separately on the damage schedules. This was to facilitate

application of 100% of of the $150,000 paid on the note indisputably supports usury which in turn validates negligence per se. Res ipsa loquitur.

In fact, Respondents argued against this charge.

> Since the trial court sustained a demurrer to the petition, the petition must be liberally construed, and all of its allegations of fact must be taken as true, together with all reasonable inferences therefrom. "If any fact stated therein entitles plaintiff to any relief, the trial court erred in sustaining Bank's demurrer to the petition." *Wallace v. Williams*, Okl., 313 P.2d 784. We therefore hold the petition contains sufficient allegations of usury and the trial court erred in sustaining Bank's demurrer. *Hollamon v. First State Bank Of Stroud*, 389 P.2d 352,Ok (1963)
>
> In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atlantic Corp., supra,* at 1955, 127 S.Ct. 1955 (slip op., at 8-9) (citing *Swierkiewicz v.Sorema N.A.*, 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002);

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the penalty assessed by law, as well as to prevent any overlapping of charges, since the "excess expenses" did include the excess of interest paid to respondents over the amount to be paid on the new financing due to rate differences.

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> *Neitzke v. Williams,* 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)). *See Erickson,* supra. at 2200.
>
> The dimensions of a suit are not determined by the pleadings, Dearman v. Woodson, 429 F.2d 1288 (10th Cir. 1970); and it is not necessary to allege the particular law or theory under which recovery is sought. United States v. Missouri-Kansas-Texas Ry. Co., 273 F.2d 474 (10th Cir. 1960).
>
> The Beshara court held: For simplicity, we refer to the action as one in conversion. Whether the Bank withheld Beshara's funds for a commercially reasonable length of time, whether it wilfully or intentionally dishonored the checks, or whether any damages were proximately caused by the dishonor is a question of fact for the jury. Consequently, the trial court erred in refusing to submit the wrongful dishonor claim to the jury.

As there, the court erred in not allowing Petitioner's claims to go to the jury. His failure to recall what his previously orders were demonstrates the confusion and misapplication of law that pervades this case. It is inconceivable how the appellate missed this error in application of well settled law unless no review was made.

The courts analysis of the pre-trial report

was erroneous.

*"Ms. Knight did include conversion as a legal issue in the amended final pretrial report. The district court anticipated adopting the pretrial report as the pretrial order, and the inclusion of a claim in the pretrial order can supersede the pleadings, see Weyerhaeuser Co. v. Brantley, 510 F.3d 1256, 1267 (10th Cir. 2007)). For two reasons, however, we do not consider the pretrial report to have amended the pleadings in this case. First, the district court specifically ruled that it would not allow the pretrial report or order to revive or expand the claims at issue beyond the already asserted claims of breach of contract, bad faith breach of contract, and tortious interference. Second, Ms. Knight does not appear either to argue that the pretrial order actually amended the pleadings, or to explain why the district court should have allowed an eve-of-trial amendment to the pleadings.."* Apx20a

The District Court noticed issues in the pre-trial order signifying - "maybe it's in there to preserve a position or something." Apx 59a

Furthermore, the April ruling was made before Petitioner was a party.

The District Court's ruling that it would not expand or revive claims since he had already ruled in April, 2007, was based on forgetfulness or misunderstanding of the claims. (Apx 59-60a)For instance, interest charges ruled on then was Petitioners' application of payments according to the previous owner's procedure. This had nothing to do

with the usurious charges made by Respondent by applying 100% of all payments to interest. That action by Respondent converted the payments to interest and unjustly enriched Respondent. Usury, conversion, unjust enrichment and negligence per se claims all relate to and are proven by that improper posting of payments.

*Ms. Knight argues that the district court should have allowed her to proceed with claims of negligence, negligent nondisclosure, and negligent misrepresentation. The district court dismissed these claims on the ground that Oklahoma requires more than mere negligence to impose tort liability on a commercial lender. As discussed above, this appears to be a correct reading of Oklahoma law. See Rodgers, 756 P.2d at 1227; see also Beshara, 928 P.2d at 288; First Nat'l Bank & Trust Co. of Vinita, 859 P.2d at 509." .. Apx17-18a*

This statement is simply wrong. The district court allowed Phoenix to assert tort liability at trial. In addition that ruling referred to was prior to vacating its previous decisions. Apx 62a

> As a general rule, a plaintiff should not be prevented from pursuing a valid claim just because she did not set forth in the complaint a theory on which she could recover. *Wright & A. Miller, Federal Practice & Procedure* 1219 at 194 (1990)§ 1219 at 282-83 (2004)
>
> We recognize that most of our sister circuits have stated the general rule that a complaint need not set forth the plaintiff's legal theories

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8.04. *See James Wm. Moore et al., Moore's Federal Practice § Federal Practice and Procedure* § [3] n. 13 (3d ed.2008) (collecting cases); *Charles Alan Wright & Arthur R. Miller* 1215 n. 1 (3d ed.2004) (same).

We review de novo the district court's interpretation of a statute. United States v. Frega, 179 F.3d 793, 802 n.6 (9th Cir. 1999). *See also* Pignanelli v. Pueblo Sch. Dist. No. 60, 540 F.3d 1213, 1216 (10th Cir.2008) (on appeal from summary judgment, evidence is viewed in light most favorable to appellant); Drabik v. Stanley-Bostitch, Inc., 997 F.2d 496, 506 (8th Cir.1993) (on appeal from denial of requested instruction, "evidence must be examined in the light most favorable to the party proposing the instruction").

The court's refusal to allow those claims was clearly erroneous, arbitrary and an abuse of discretion, in opposition to clear unmixed question of law and against the interest of justice and in opposition to opinions of this Court, other circuits and its own.

## Exclusion of Lay witnesses

*"The subject matter of the proffered testimony was not what the witnesses had personally observed but opinion testimony regarding possible future occurrences."* Apx22a

The district court made no suggestion of voir dire and had no reasonable basis to conclude their

testimony would be other than tasks performed or observed as was indicated on the witness list. Petitioner was not given any opportunity to testify, therefore the court could not make any reasonable decision as to the admissability of the testimony.

## The courts failed to give consideration to Pro Se pleadings

> Pro Se parties have the right to Appeal, and submit their briefs on appeal even though they may be inartfully drawn", *Vega v. Johnson*, 149 F.3d 354 (5th Cir. 1998). Also, "Courts will go to particular pains to protect pro se litigants consequences of technical errors if injustice would otherwise result." (emphasis) *U. S. v. Sanchez*, 88 F.3d 1243 (D.C. Cir. 1996).
>
> Consistent with Supreme Court and Tenth Circuit precedent, the Court will construe pro se pleadings liberally when ruling on a motion for summary judgment. *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Gaines v. Stenseng*, 292 F.3d 1222, 1224 (10th Cir.2002); *Cf. Estelle v. Gamble*, 429 U.S. 97,106, (1976).
>
> Court errs if court dismisses pro se litigant without instructions of how pleadings are deficient and how to repair pleadings." *Plaskey v CIA*, 953 F .2nd 25. "The trial judge should inform a pro se litigant of the proper procedure for the action he or she is obviously attempting to accomplish." (emphasis added) *Breck v. Ulmer*, 745 P.2d 66, 75 (1987).

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> Accused pleadings may not be summarily dismissed. This court is hereby put upon mandatory notice to observe the determinations of the Supreme Court of the United States, in the case Puckett v. Cox where it was held that a pro-se ... complaint requires a less stringent reading than one drafted by an attorney, said by Justice Black in *Coneley v. Gibson*,355 U.S. 41 at 48 (1957). *Hagins vs Levine* 415 US 533 note 3 (1974) SeeArthur v. Fry, 300 F. Supp. 622 (1960). Puckett v. Cox 456 F2d 233 (1972 Sixth Circuit USCA) see also Haines v. Kerner, 404 US 519-521 (1972).
>
> "... allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, id* 355 U.S. 41, 45-46 (1957). *See Dioguardi v. Durning,* 139 F.2d 774 (CA2 1944); Plaskey v. CIA, supra

This Court should determine whether the deference to the award of attorney fees requiring only narrative rationales without disclosing detailed calculations

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(which presumably would be utilized) provides an adequate method for review of the reasonableness of such awards.

The theory expressed for determination of the attorney fees award was not reliably applied thereby arriving at a clearly prejudicial and erroneous result, against reason, logic and facts, that was manifestly unjust .

*"Both sides sought attorney fees. Capital and Financial requested a fee award of $306,644.34 against Ms. Knight (but not against Phoenix); and Phoenix requested an award of $224,392.17 against Capital and Financial. Without holding a hearing on the fee motions, the district court applied Okla. Stat. tit. 12, § 936 and granted both motions in part. It ordered Capital to pay Phoenix's fees in the amount of $49,000 and Ms. Knight to pay Capital's and Financial's fees in the amount of $88,000. Phoenix and Ms. Knight appeal both the judgments on the merits and the fee awards". Apx6a.*

23 O.S.2001, § 21: Whether a party is entitled to a statutory attorney's fee is a legal question, and will be reviewed de novo by this Court. Kluver v. Weatherford Hosp. Auth., 1993 OK 85, ¶ 14, 859 P.2d 1081, 1084. Once the legal right to a fee is established...The standard of review then becomes whether the trial court made a clearly erroneous conclusion and judgment, against reason and evidence

and thus abused its discretion in granting the attorney's fee award. Broadwater v. Courtney, 39, ¶ 7, 809 P.2d 1310, 1312 (OK 1991)

This Court reviews any such award under an abuse of discretion standard. A trial court abuses its discretion when it applies an incorrect legal standard or has reached a decision which is against logic or reasoning that caused an injustice to the party complaining. *Eldridge v. Eldridge*, 42 S.W..3d 82, 85 (Tenn. 2001).

It is even more apparent in the fees award than in the merits award that the decision lacks logic, ignores facts presented, and contradicts items given judicial notice. In short, the mere making of the statements that certain items were noticed did not carry over into the calculation. In other words, the court's theory was not reasonably or reliably applied in the methodology. The conclusion is connected to the data only by the "ipse dixit" of the court and disproven by mere arithmetical calculations.

*"In appealing the fee award of $88,000 to Capital and Financial, Ms. Knight argues that the district court erred in giving no weight to her pro se response; that the court erred in awarding fees to Capital and Financial based on her contract claim even though she was similarly situated to Phoenix, which was successful on its contract claim; that the award was excessive; and that Capital and Financial do not deserve an award of fees because of their bad faith and misconduct."* Apx26a

*"(To the extent that Ms. Knight also adopts*

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*arguments made by Phoenix, they fail for the reasons discussed above.)"* Apx27a

The court listed those as: No hearing was required, and that the court properly applied the Burk factor including this statement:

*"Phoenix's counsel spent some time on Phoenix's tort claims and Ms. Knight's counterclaims, which were unsuccessful"* Apx27a

This contradicts the district court's statement when in Phoenix' fee award it acknowledges,

> "Recognizing this, Phoenix has made significant redactions, principally from the time otherwise charged by Mr. Watson and Mr. Brown, for time spent on Ms. Knight's claims. While certain adjustments to the time of others is arguably appropriate, the court concludes the indicated redactions reasonably approximate the time attributable to the Knight claims." Apx43a
>
> In addition the court states "Many of these [issues] are necessarily judgment calls for which a detailed factual or mechanical analysis is not proactical"
>
> This begs the question how then is the fee or the reasonableness of it determined? Certainly this decision must have involved some undisclosed mathematical computations.

*"It appears that the first—and only—request for a hearing appeared in a pro se motion for*

*reconsideration filed by Ms. Knight. As stated above, as a nonattorney, Ms. Knight could not represent Phoenix in this litigation. See Tal v. Hogan, 453 F.3d 1244, 1254 & n.8 (10th Cir. 2006) (collecting cases)." Apx25a-Note 6*

This statement makes no sense, Petitioner's request for a hearing on fees assessed against her should not be denied because Phoenix was the other party.

*"But as with the Note argument, the parties have not argued on appeal that this claim is not among the fee-bearing claims listed in § 936. And they did not raise such an argument before the district court. Thus, any such argument also is waived"* Apx24a-Note5.

Petitioner did argue that Respondents even stated they were not claiming under that statute, only under the contract, and they did not name Petitioner in the suit. Apx

*"The district court declined to consider Ms. Knight's pro se response to Capital and Financial's attorney-fee motion. We acknowledge that three days before Ms. Knight filed her pro se response, she filed notice that she wished to proceed pro se. Still, the district court did not commit reversible error in giving no weight to the response. The response was not restricted to Ms. Knight's position, but purportedly also was submitted on behalf of Phoenix, an entity which Ms. Knight could not represent in court. In addition, it was somewhat duplicative of the response filed by counselApx27a*

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The appellate statement usage "purportedly" indicates no review was made of the documents, therefore how can the court determine whether there was an abuse of discretion? It is obvious the appellate merely adopted the court's statement. 5 pages of litigation history of 24 pages hardly meets the allegation of representing Phoenix. (Apx 203a) To state that it was duplicative of counsel's further indicates the failure to read the pleadings but rather mere adoption of lower court's comments. Counsel's 5 page pleading did not even seem to realize that the fees award was assessed against only Petitioner, not to mention other inadequacies. Petitioner's request for reconsideration (Apx143a) ran to 30 pages also, and yielded a one-line order denying it. Apx 30a.

Further, it is error to suggest that the proceedings that created the fees has no bearing to the determination of the award. This is especially true due to the tortious progress of the case. The court, itself, included certain history in its analysis, even though the impact on the awards is less than clear. That inclusion is as much a re-arguing the case as was Petitioner's pleadings.

Neither was any apparent consideration given to Petitioner's appeal disputing this same characterization.

This also ignores that courts are not only obligated to accept pro se pleadings, but to allow more liberal review.

Petitioner also argued:

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She succeeded both in equity and receiving a monetary award evidenced by the reduction in the balance being claimed. She cited cases where no money damages were awarded yet party was deemed prevailing party.-

That she had no obligation to pay any fees for breach of contract since Phoenix was the only party claimed against.

That Respondents cannot recover for prevailing on Knight's tort claims, including the good faith and fair dealing, by law and since Mooring only preserved the right to recover for fees specified in the note and mortgage and further that Mooring is not entitled on the one remaining claim as discussed in Doc 353.

Based on the ratio to total fees, the award is not equitable even if chargeable to Petitioner and/or additionally has the effect of charging her with fees related to Phoenix that the Order clearly states are not chargeable to her.

The district court acknowledged Knights late entry, the failure to ask fees against Phoenix, that the contract does not provide a basis for fees tort claims, that counsel for Knight did not dispute the Section 936 was appropriate to claim under,

The courts failed to acknowledge that Knight disputed the award under 936 as well as the contract or that the contract limited recovery of fees.(See Apx 38a note12)

*"On appeal Ms. Knight has not identified any*

*argument in her pro se response that would have changed the result."id*

Statements like this leave one aghast. Obviously no statement changed the result. A better word would be "should" have and those statements are as they are and summarized here. Obviously a fee award that very likely exceeds 100% of allowable charges cannot be in the interest of justice.

*"Ms. Knight also asserts that she prevailed in substance, and complains that Capital and Financial should not be able to recover fees on the contract claim because she and Phoenix (which was successful on its contract claim) were similarly situated. But legally she did not prevail, and she and Phoenix were not similarly situated. Damages are an essential element of a claim for breach of contract. See Digital Design Group, Inc. v. Info. Builders, Inc., 24 P.3d 834, 843 (Okla. 2001). Phoenix had evidence of damages and proved a portion of its claimed damages to the jury's satisfaction. In contrast, as discussed in No. 09-6075, Ms. Knight did not have any admissible evidence of individual damages. Thus, Phoenix was successful with its claim, whereas judgment was entered in favor of Capital and Financial on her claim."* Apx27-28a

Petitioner's argument was any ruling should have reached the same indisputable conclusion, that Capital breached the contract as against both signing parties. The court's answer was after the ruling that denied any damages, the conclusions were different. See also court's confusion at Note 3 Apx 17a.

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No weight was given to the fact of achieving the result desired, reduction to the true balance.

*"Ms. Knight also argues that the amount of the award was excessive because the district court gave too much weight to Capital and Financial's evidence, did not properly weigh that Capital and Financial created the situation that led to increased fees, failed to consider that Ms. Knight did not enter the case until January 2008, and failed to consider that Capital and Financial would have borne the same expenses if Phoenix had been the only party. We see no abuse of discretion in the court's award. The court noted that both sides bore some responsibility for "a small to medium sized problem blossoming out of control." No. 09-6141, Aplt. App. Vol. II at 472. Apx28a*

The appellate's reference to "blossoming" ruling derived from the order vacating rulings before Petitioner was a party.

*The court recognized that Capital and Financial improperly sought fees for time periods before Ms. Knight became a party. It thoughtfully reviewed the case, taking into account "the time spent on Ms. Knight's claims versus those involving Phoenix, the apportionment necessary to reflect time attributable to only the contract-based claim asserted by Ms. Knight against Mooring, and all surrounding circumstances" in arriving at its fee award. Id. at 476. Although Ms. Knight claims the district court erroneously believed that she and Phoenix "persistently" refused "to ever offer their suggestion*

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*as to what the appropriate payoff balance was," id. at 475, we will not reweigh the evidence. There is record support for the district court's view." Apx28a*

This is a distorted presentation since it re-iterates only a partial statement . See Apx 165a Item 1. Since this presumption by the court seems to have had a material effect on the award, a question of law is thus presented which calls for a consideration of the record, not for the purpose of weighing the evidence, but for the purpose of determining whether there was some evidence.

Although the district court stated

"Approximately half of the fees sought by Mooring relate to time spent before she became a party. ....Mooring.... seeks fees against Ms. Knight for periods when she was not even a party in the case." Apx 41note 18), analysis does not indicate this was actually taken into effect in the award.

The mere making of the statements that certain items were noticed did not carry over into the calculation. In other words, the court's theory was not reasonably or reliably applied in the methodology.

There is no reasonable support for the district court's view. The final calculation of the award is connected to the facts only by it's own "ipse dixit"

As noted above, "time attributable to only the contract based claim", was assessed at $88,000, though acknowledged by Respondent as not being claimed under Sec 936, and without suing her under the contract. Contrary to appellate's statement,

Petitioner disputed the award for those reasons.

The award, as was argued by Petitioner, amounted to 94% of total amounts billed and more than 134% of court rejected proposed lodestar after deduction for time charged before Petitioner entered the case and after she was excluded, which the court did not do, and by equally splitting the remaining charges after her entry despite the fact defensive arguments would be the same if she were not a party In comparison, the fees award to Phoenix was set at less than 20% of acceptable lodestar, also on only the contract based claim. Apx 176a.

Even this simplified computation demonstrates the inconsistency and in justice of the award. The court's "thoughtful review" failed to reveal pertinent facts, such as what percent was used to reduce Respondent's billings to lodestar since their suggested 30% was deemed inadequate. *See* Apx 176 note 11 for further unmade or unexplained adjustments. Apx 40a

The district court gave no judicial notice that Petitioners achieved the result desired of reducing the balance to a true amount and declaratory judgment was provided but not acknowledged.

*"Finally, Ms. Knight contends that Capital and Financial are not entitled to an award of attorney fees because of their bad faith. "To strictly apply the American Rule in this case would be to do a great 'injustice to Knight and reward Mooring for its oppressive acts." Knight Aplt. Br. at 29. But the district court declined to find that Capital and Financial acted in bad faith. Further, the district*

*court assessed blame for the protracted litigation on all parties, not just Capital and Financial. These determinations exhibit no abuse of discretion."* *Apx29a*

It is believed the court made no ruling regarding bad faith, just merely ignored the issue, concluding that fees were not allowed as compensatory damages.

## CONCLUSION

The petition for a writ of certiorari should be granted for each or all of the reasons stated above to send a message and clarify other matters.

Or in the alternative the case should be reversed and remanded.

Respectfully submitted,

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